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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re M.R., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

C.W.,

Defendant and Appellant.

G050117

(Super. Ct. No. DP022960)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Deborah C.
Servino, Judge. Affirmed.

Merrill Lee Toole, under appointment by the Court of Appeal, for
Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen and Debbie
Torrez, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

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Defendant C.W. (mother) appeals from orders denying two Welfare and Institutions Code¹ section 388 petitions² and terminating her parental rights to now six-year-old M.R. (child). Child's father has not appealed.

In the section 388 petitions, mother originally sought to have child returned to her custody under family maintenance or alternatively a 60-day temporary release. She later sought weekly therapeutic visitation or return of child under a family maintenance plan. Mother claims the court erred in denying the petitions without a hearing because she had shown both changed circumstances and benefit to child. Mother also argues that, because the court did not order a hearing, the order terminating parental rights must be reversed.

The court did not abuse its discretion in summarily denying mother's petitions and, as that is the only ground for mother's appeal of the order terminating parental rights, there is no basis to reverse any of the orders. We affirm.

FACTS AND PROCEDURAL HISTORY

In August 2012 when child was four, she was taken into custody and later detained when police responded to a domestic violence incident between mother and mother's husband (stepfather). Child had witnessed a substantial amount of domestic violence between mother and stepfather. She was afraid of stepfather because he would spank her and he and mother always argued.

Child was placed with her paternal grandmother. Although child had some behavioral issues, she quickly adjusted to living with her. Grandmother had raised child

¹ All further statutory references are to this code.

² Mother filed three such petitions. Although she purports to appeal the rulings for all three, the first is jurisdictionally barred because the appeal was filed too late. (Cal. Rules of Court, rule 8.406(a) [appeal must be filed within 60 days after order filed].) The order denying the first petition was filed on January 23, 2014. The notice of appeal was filed May 8, 2014. Mother essentially concedes this in her reply brief, where she explains she discussed the first petition for context to show she sought relief from the date it was filed.

from age 18 months until she was three and child was bonded to her. Mother had had little contact with child during that period.

Mother had a history of substance abuse and had been convicted for both possession and sale of narcotics. Earlier in 2012 she had to be hospitalized for overdosing on a variety of prescription drugs. But she continued daily use of Soma and oxycodone and tested positive for oxycodone, marijuana, and opiates. Several times during meetings with plaintiff Orange County Social Services Agency (SSA), it appeared mother was under the influence of drugs.

Similarly, mother often appeared to be under the influence when visiting with child. She frequently seemed tired, was not steady when standing, and made numerous 10-minute visits to the bathroom.

During one visit mother whispered in child's ear that grandmother and child's great-grandmother were lying to child. Thereafter, child's therapist noticed a "drastic change in the child's behavior." Child reported to the social worker she was angry and afraid of stepfather for herself and for mother. Mother missed several visits during the latter part of 2012. Child believed this was because stepfather choked or otherwise hurt mother.

The court ordered family reunification services for mother. They included her participation in therapy, attending parenting classes and a 12-step program, substance abuse treatment, and random drug testing. Monitored visitation continued to be six hours per week.

SSA reported mother failed to avail herself of the services and failed to take responsibility for her actions. She missed several drug tests and for those she attended she often tested positive for a variety of narcotics. Mother continued to appear to be under the influence in meetings with the social worker and during visits with the child.

During this period stepfather was jailed and mother became pregnant. Child had been progressing in therapy to remedy poor impulse control and tantrums.

When she learned of mother's pregnancy, child had a setback and reverted to some of her former conduct.

At the 12-month review hearing in November 2013, the court terminated mother's services and set the permanency hearing.

In January 2014 mother filed the first section 388 petition. She requested a bonding study to evaluate her relationship with child, and also sought visits between child and mother's newborn (brother).³ After argument, the court denied the motion without a hearing, finding mother had not made a prima facie case of changed circumstances nor that the requested relief served child's best interest.

The report for the permanency hearing stated child was stable in her placement with grandmother. She was academically and developmentally where she should be. Child had said she wanted to live with grandmother. It was likely child would be adopted and grandmother was the prospective adoptive parent.

Mother had not visited from April until October 2013. In the first couple of visits after visitation resumed, mother and child got along well, playing and doing homework. They were affectionate toward one another. But child was worried about mother and stepfather's relationship. Mother then cancelled several visits, "stating that she was sick."

At that time child's emotional and behavioral problems recurred, requiring child to return to therapy. The therapist reported child's distress and diagnosed her with "Adjustment Disorder with Anxiety." The therapist pointed out child's "stressor" directly correlated to mother's reappearance. She observed that the seven months of mother's absence "is a long time in a young child's life." She was teaching child "coping skills to manage her anxiety" and how to "create a more safe [*sic*] environment for herself."

³ Brother was taken into custody after his birth.

During this time child began to refuse to visit mother. She said she “did not feel safe” and feared “mother would be mad at her for telling . . . ‘mommy’s secret.’” She was not persuaded to visit even after being reassured she would be safe. Thereafter child attended a few more visits but then again refused to visit, despite social workers’ efforts to convince her to attend.

Grandmother reported to the social worker that, although child was at first excited about visiting with mother after mother’s absence, and wanted to “check up on her new baby brother,” her behavior problems began recurring. Her two episodes of enuresis at school had never before happened. Grandmother believed these behaviors were caused by recommencement of visitation.

The SSA report also stated that several months later child misbehaved at school and was embarrassed and upset about it. The therapist explained she believed child felt she had no control over her life and was trying to get some. Child told the social worker she was afraid she would have to live with stepfather and was having nightmares about it. She again reverted to past defiance, aggression, and other problematic behavior. Child “behave[s] negatively” whenever asked about visiting mother. She was still “picking at her skin,” which could be connected to her anxiety. The therapist changed her diagnosis of child to “Adjustment Disorder with mixed anxiety and depressed mood,” noting she might need to be treated with medication.

Mother was upset child was not forced to visit and requested therapeutic visitation but the therapist advised this was not in child’s best interest, because mother was the “direct trigger” for child’s anxiety. Child was still experiencing posttraumatic stress disorder in connection with mother and stepfather.

The report stated that although child and mother may have had a “slight bond,” their relationship was not that of a parent and child. Child did not view “mother as a protector” and did not “particularly trust her.” If anything, child had more of a parental role.

The report for the permanency hearing also explained mother had not completed her plan requirements.

In March 2014 mother filed her second section 388 petition, this time asking the court to return child to her custody either under a family maintenance plan or for a 60-day trial visit. In her supporting declarations mother stated she had “resolved the problems that brought [child] into custody.” She had stopped taking any illegal drugs when she became pregnant with brother, using only methadone until November 2013, at which time she took only ibuprofen or Tylenol. She enrolled in an outpatient drug program in January 2014, and drug tests had been negative since that time.

The declaration also stated she was attending family counseling and anger management and domestic violence classes and submitted letters documenting her participation. She and stepfather had completed a parenting class; there had been no incidents of domestic violence between them since child had been taken into custody.

Mother also stated now she had unmonitored visitation with brother, three times per week, eight hours per day. She was also concerned with grandmother’s health and her ability to care for child until her majority. It was in child’s best interest to “be raised in her family of origin with a mother and step[.]father and her sibling.”

At the hearing on the petition, the court found that although mother’s circumstances were changing, she had not made a prima facie case they had changed nor that the request was in child’s best interest. The court then denied mother’s request for visitation with child in a “therapeutic setting.” It noted child’s therapist and the social worker were both working with child and encouraging her to visit.

Before the permanency hearing, mother filed her third section 388 petition. She sought weekly therapeutic visitation or alternatively that child be returned to her custody under a family maintenance plan. She again argued it was in child’s best interest because she would be raised with mother, stepfather and brother.

Mother supplied the declaration filed with the second motion and added new information. This included her completion of a drug treatment program for which she provided a certificate. Additionally, she was participating in the services ordered in connection with brother and had unsupervised weekly and overnight visitation with him and daily supervised visits. Mother also filed the six-month review report in brother's case, which recommended he be returned to care of mother and stepfather on a family maintenance plan.

The court denied the motion, again finding there was no prima facie evidence the changes sought were in the best interest of the child. It noted mother had missed several visits and child was "reluctant" to visit. Moreover child was suffering nightmares because she might have to see stepfather.

At the permanency hearing in May 2014, the social worker testified when visitation resumed in October child was affectionate and visits were "within the norm." In December child did not want to see mother. Although child's behavior had improved when she was not visiting with mother, once visitation started again, she reverted back to prior problematic conduct. Because stepfather lived with mother, child did not feel safe nor that mother was safe. Child's therapist reported to SSA that visiting with mother was one of child's "triggers" for her anxiety and problem behavior.

Mother testified she had stopped visiting from April through October 2013 because she was ashamed she had been "kicked out" of her last visit in April. Although she tried to call a couple of times she never received a return call. Once the visits began again, they went well. They did homework and played. Child called mother "mommy" and told her she loved her. Often child asked about brother, and mother believed child wanted to meet him. Mother knew child was afraid of stepfather.

Mother also realized child did not want to visit and she knew child could not be returned to her. But she wanted to leave open the possibility that child could visit if she changed her mind in five to ten years.

The court found termination of parental rights was in child's best interest. She was likely to be adopted and mother had not proven any exception to termination. Mother had not shown consistent contact, and her irregular visitation may have been more detrimental than none at all.

DISCUSSION

1. Denial of Section 388 Petitions

To prevail on a section 388 petition, a parent must show by a preponderance of the evidence both changed circumstances and that the requested modification would be in the best interest of the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) To merit a hearing, a prima facie case of both elements must be presented. (*Ibid.*) "If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) We review denial of a hearing on a petition under section 388 for abuse of discretion. (*Ibid.*)

Mother argues that by denying a hearing on her section 388 petitions, the court failed to enforce her visitation rights. Instead, she claims, it improperly delegated its discretion to permit visitation to child and child's therapist. In support of her position she relies on *In re Hunter S.* (2006) 142 Cal.App.4th 1497 (*Hunter S.*).

In *Hunter S.* the five-year-old child was detained due to domestic violence and an unsafe home environment and again when the mother went to prison. While the mother was in prison she and the child had a close relationship. The mother availed herself of her services and completed many portions of her case plan.

Once the mother was released from prison the child began to resist contact with her. He informed his therapist he felt safe with his grandparent with whom he lived and did not miss his parents. He also was mad at the mother and feared that he would be neglected and abused if he returned to her custody. Although the social workers,

relatives, and his therapist tried to convince him to visit with the mother, the child steadfastly refused and also resisted conjoint therapy. This pattern continued for a period of more than two years, with the child consistently expressing the same sentiments.

During this time, the mother persisted in seeking visitation. At one review hearing, the court stated it would not, as a practical matter, force the child to visit, but that later it might not just “leave [visitation] in [the child’s] hands.” (*Hunter S., supra*, 142 Cal.App.4th at p. 1502.) At another, the court did not rule on a request for visitation or conjoint therapy.

Finally, when the mother filed a section 388 petition to reinstate services, the court denied it, finding it was not in the child’s interest, even though it also found the mother had shown a change of circumstances. It then terminated parental rights, finding no exception under section 366.26, subdivision (c).

The court of appeal reversed, holding the court erred by handing over “unlimited discretion” to the child and his therapist whether visitation would occur. (*Hunter S., supra*, 142 Cal.App.4th at p. 1505.) The child was impermissibly given complete veto power over visitation because the court “abdicated its duty.” (*Ibid.*) The court could have ordered an end to visitation on a finding it was detrimental to the child (§ 366.21, subd. (h)) but never did so. (*Hunter S.* at pp. 1504, 1505.) Instead, the mother was denied the opportunity to improve her relationship with the child. The court then used the lack of visitation and a close relationship as the basis for its ruling it was not in the child’s best interest to grant the petition.

Hunter S., is factually and legally distinguishable from our case. First, there was never a finding mother and child had a close relationship and the facts bear that out, despite some pleasant visits and affection between the two of them. Second, child refused to visit for only a short period of time. Instead, the bulk of the missed visitation was due to mother’s absence. Contrary to *Hunter S.*, the lack of a bond and insufficiency of contact was not due to the court’s failure to enforce the visitation order or child’s

absolute control of visitation, but because mother did not fully take advantage of the visitation that was ordered.

Further, in denying the motions, the court found visitation would not be in child's best interest. Given child's emotional distress and behavioral problems, there was more than enough evidence to support the finding.

Mother argues child had no emotional problems while visiting with her nor during the time period when visitation was occurring. But the therapist was of the opinion the visits triggered child's behavioral and emotional problems and child was afraid of having to live with mother and stepfather.

In re Donovan J. (1997) 58 Cal.App.4th 1474, on which mother relies, actually supports the court's ruling. It held visitation could not be solely conditioned on the children's therapist's consent; the trial court had to decide. But the court was allowed to rely on the therapist's input. (*Id.* at pp. 1476-1478.) That is exactly what happened here.

Mother maintains there was no evidence she ever discussed stepfather with child or told child she would have to live with stepfather. But that was clearly her intent as demonstrated by her declarations in support of her petitions. The source of the information given to child does not matter. Her fear and stress are the facts that bear on the issue.

Finally, mother has not shown denying the motions without a hearing caused her prejudice. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1162.) Mother claims she should have been allowed to testify but identifies no evidence she would have presented in addition to what is contained in her declarations. Without even discussing the changed circumstances element, mother's declarations present no evidence as to why the requested modifications would be in child's best interest. Because reunification services were terminated, our focus must be on permanence and stability for child, not family reunification. (*Id.* at p. 1163.)

2. Termination of Parental Rights

Mother's entire challenge to the termination of parental rights is based on her claim the court should have granted the section 388 petitions. Because the court did not err in denying them, there is no basis to reverse the order terminating parental rights.

DISPOSITION

The orders are affirmed.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.